KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL

HENK BRANDS
SEAN A. LEV
EVAN T. LEO
ANTONIA M. APPS
MICHAEL J. GUZMAN
AARON M. PANNER
DAVID E. ROSS
SILVIJA A. STRIKIS
RICHARD H. STERN, OF COUNSEL

May 11, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, DC 20554

Re: *In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7

Dear Ms. Salas:

Enclosed for filing please find an original and four (4) copies of the *Reply Comments of SBC Communications Inc. and BellSouth Corporation* in the above-captioned matter. I have enclosed an additional copy for date-stamp and return in the self-addressed envelope provided. Thank you for your assistance in this matter.

Yours sincerely,

Michael K. Kellogg

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Nondiscrimination in the	)	CS Docket No. 01-7
Distribution of Interactive	)	
Television Services Over Cable	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC. AND BELLSOUTH CORPORATION

Jeffry A. Brueggeman
Roger K. Toppins
Paul K. Mancini
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8895
Counsel for SBC Communications Inc.

Charles P. Featherstun
Theodore R. Kingsley
David M. Falgoust
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E., Suite 1700
Atlanta, GA 30309
(404) 249-3855
Counsel for BellSouth Corporation

Michael K. Kellogg
Colin S. Stretch
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for SBC Communications Inc. and BellSouth Corporation

May 11, 2001

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

Despite the broad array of comments filed in this proceeding, there is virtual unanimity on one critical point: the key question here — the question which will determine whether and how to regulate cable participation in the ITV services market — is whether the cable platform possesses market power in the distribution of ITV services. Commenters also agree, moreover, that the answer to that single all-important question turns on whether competing broadband platforms are adequate to mitigate cable's existing advantages and prevent it from exercising market power.

What commenters largely fail to recognize, however, is that, at this stage, the viability of competing platforms turns less on cable's technological and marketplace advantages than it does on its regulatory advantages. As SBC and BellSouth have noted previously, the Commission's broadband policy is upside-down. Cable, the dominant provider of ITV and other broadband services, is hardly regulated at all, while cable's non-dominant telephone-company competitors are trapped in the edifice of burdensome Title II regulations that the Commission has constructed around the provision of DSL-based services.

This regulatory disparity is not just unlawful, it is downright nonsensical. The Commission now has two proceedings underway dedicated exclusively to the question whether the cable broadband platform possesses sufficient market power to warrant regulation.[1] At the same time, the Commission has threatened, and in many cases already imposed, burdensome

---

[1] In addition to this proceeding, see Notice of Inquiry, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287 (2000) ("Open Access NOI").

obligations that prevent telephone companies from developing and deploying a competitive alternative that could well make any such regulation unnecessary.[2]

The Commission thus stands at a crossroads. On the one hand, it can deregulate broadband services in a manner that, as Chairman Powell has explained, is "consistent with converged technology and markets."[3] That market-based approach would be fully consistent not just with Chairman Powell's publicly expressed views, but with Commission precedent concluding that broadband markets are competitive.[4] As the D.C. Circuit recently explained, if broadband markets are competitive, regulation of those markets is a "*non sequitur.*"[5]

---

[2] *See, e.g.*, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 & 96-98, FCC 01-26 (rel. Jan. 19, 2001) ("*Advanced Services FNRPM*"); Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) (requiring incumbent LECs to "unbundle" the local loop spectrum used to provide high-speed digital services); Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd 6040 (1998); Public Notice, *Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Docket Nos. 95-20 & 98-10, DA 01-620 (rel. Mar. 7, 2001).

[3] Commissioner Michael K. Powell, *The Great Digital Broadband Migration*, Remarks Before The Progress & Freedom Foundation, Washington, D.C. (Dec. 8, 2000).

[4] *See, e.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857 (2000) ("*Fixed Wireless Competition Order*") (removing ownership limitations on fixed wireless because of competition among broadband platforms); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.*, 15 FCC Rcd 9816, 9866, ¶ 116 (2000) ("*AT&T/MediaOne Order*") (rejecting public interest concerns stemming from merger of two broadband providers in light of "actual and potential competition" in broadband market).

[5] *Association of Communications Enters. v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001).

Or the Commission can keep regulating. If the Commission chooses this course, however, it must be prepared to extend its regulation broadly to encompass cable broadband. As the Commission's own figures make clear, the cable platform dominates broadband Internet access generally.[6] And as commenters in this proceeding make equally clear, that general broadband dominance is, if anything, accentuated in the ITV services market, where cable's unique two-way transport attributes and enduring MVPD market power are proving to be particularly critical.[7] If cable is to remain unregulated in these markets, it must be because it faces sufficient competition from alternative two-way transport platforms to curb its exercise of market power. But that will not happen unless the Commission permits the chief alternative, DSL, to compete on equal terms. If the Commission continues to burden DSL with expensive, one-sided obligations that dramatically reduce the financial incentive to develop and deploy networks, it could very well prevent DSL from providing an effective counterbalance to cable's current dominance.

These Reply Comments thus make three basic points. *First*, as suggested above, a viable DSL platform is critical to competition in the ITV services market. Unless the Commission rolls back the regulations it has imposed on incumbent LEC provision of DSL, that alternative platform will be less able to provide an effective counterbalance to the cable platform's existing dominance, and the Commission will be obliged to intervene.

---

[6] *See* Seventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, ¶ 52 (rel. Jan. 8, 2001) ("*Seventh Video Competition Report*") ("By June 2000, there were 820,000 DSL subscribers compared to more than 2.3 million cable Internet access subscribers."); Industry Analysis Div., FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, at Table 5 (Oct. 2000) (estimating 950,590 ADSL subscribers and 2,248,981 coaxial cable subscribers as of June 30, 2000).

[7] *See infra* pages 9-11.

Second, even with a viable DSL alternative, cable still enjoys significant advantages in the ITV services market. As many commenters explain, cable's upstream and downstream bandwidth, coupled with its dominance of the MVPD market, provide distinct advantages in ITV services. The Commission must therefore be vigilant to any demonstration by cable of power over the ITV services market.

Third, in the event cable does demonstrate such market power, the Commission has ample authority to regulate the cable platform as a "telecommunications service" under Title II. As even the cable operators acknowledge, ITV services are "information services." It necessarily follows that an ITV service provider that self-provides its transmission capacity is also providing a "telecommunications service" subject to Title II, if that self-provision is over a medium that has market power. Thus, if the cable platform possesses distribution market power, it must be regulated under Title II.

DISCUSSION

I. A VIABLE, DEREGULATED DSL PLATFORM IS ESSENTIAL TO A "HANDS OFF" POLICY FOR ITV SERVICES.

Commenters agree that the market for ITV services is nascent, and it is heavily reliant on the innovative use of costly infrastructure that is only now being deployed.[8] Indeed, it is still too soon even to determine "what future ITV offerings will ultimately drive" this market, and how consumers are likely to respond.[9] There are accordingly no sure bets in this market, making investment uncertain and deployment highly risky.

---

[8] *See, e.g.*, NCTA at 35; Gemstar at 6; Canal+ at 28; Cablevision at 19; AT&T at 34.

[9] AOL Time Warner at 1; *see* AT&T at 3; NCTA at 8; Comcast at 6; CableVision at 2.

As SBC and BellSouth previously explained — and as no party seriously disputes — these circumstances would typically warrant a "hands off" regulatory policy. Regulation impedes competition and slows growth, and it is especially important to allow market forces to determine how best to allocate resources in nascent markets, where competitors are making large investments and deploying innovative technologies. As Chairman Powell recently put it, "government often is at its worst" when it attempts to regulate a "dynamic" new market such as ITV services.[10]

Yet notwithstanding the factors pointing toward regulatory restraint, there is one key obstacle to any Commission decision to refrain from regulating cable distribution of ITV services. At this point, the DSL platform — which commenters identify as a crucial potential competitor to cable in this market[11] — is severely handicapped by burdensome regulatory requirements that do not apply to any other broadband platform.

As SBC and BellSouth have explained elsewhere, this disparate regulatory scheme is unlawful. It is black-letter law that like services must be treated alike, and the Commission's failure to adhere to that principle in the context of broadband regulation is, as a legal matter, indefensible.[12] More importantly for purposes of this proceeding, however, this disparate

---

[10] Ted Hearn & Steve Donohue, *For Powell, ITV Regs Loom Low*, MultiChannel News, Apr. 9, 2001, at 1.

[11] *See, e.g.*, AOL Time Warner at 14; AT&T at 19-21; CableVision at 16-17.

[12] *See, e.g., Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) ("If [PCS] and Cellular . . . are expected to compete for customers on price, quality, and services, . . . what difference between the two services justifies keeping the structural separation rule intact for Bell Cellular providers? The FCC provides no answer to this question, other than its raw assertion that the two industries are different."); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("Whether an entity in a given case is to be considered a common carrier" turns not on its usual status but "on the *particular practice* under surveillance.") (emphasis added); *accord* H.R. Rep. No. 103-111, at 259-60 (1993) (Congress intervened to ensure that "equivalent

regulatory scheme is equally indefensible as a policy matter. As even the most ardent proponents of DSL regulation admit, the Commission's heavy-handed policy towards DSL diminishes that platform's ability to compete with the dominant cable incumbents. Thus, the Commission's regulations create an "overwhelming regulatory burden" that is "ill-suited for the swiftly changing Internet" and that "crippl[es] . . . the development" of related industries.[13] They "deter . . . investment" while enmeshing both the Commission and competitors "in a legal and logistical quagmire."[14] Accordingly, as an emerging satellite-based provider of broadband access has explained, regulation of the broadband market has "the result of stifling exactly the sort of innovation and growth of competitive intermodal services that the Commission has always sought to promote."[15]

That last point — that the Commission's regulation of DSL stifles competition among broadband platforms — is particularly critical to the Commission's inquiry in this proceeding. As SBC and BellSouth explained in their opening comments — and as virtually all parties recognize — the question presented here is whether cable's undeniable advantages in the distribution of ITV services in the near-term will lead to enduring market power in the long-term.[16] If DSL continues to be handicapped by "overwhelming regulatory burden[s]" that "deter

---

. . . services are regulated in the same manner.") (discussing Pub. L. No. 103-66, tit. VI, § 6001(a), 107 Stat. 312 (1993)).

[13] Charter Open Access NOI Comments at iv; NCTA Open Access NOI Comments at 26; *see also* AT&T Open Access NOI Comments at 78, 80; Charter Open Access NOI Comments at 30. (Citations to Open Access NOI Comments and Reply Comments refer to documents filed with the FCC in GN Docket No. 00-185, on December 1, 2000, and January 10, 2001, respectively.)

[14] NCTA Open Access NOI Comments at 35-36; Comcast Open Access NOI Comments at 27.

[15] Starband Open Access NOI Comments at iii.

[16] SBC/BellSouth at 8-10; *see* NAB at 15-20; ALTV at 9-11; CERC at 6-7; Non-MVPD Owned Programming Networks at 11-15; Public Broadcasting Service at 5-6.

. . . investment" and enmesh providers in a "quagmire," there can be little doubt that cable's short-term market advantage will soon become entrenched market power.

Yet notwithstanding the fact that cable stands at the precipice of entrenched market power, the Commission refuses to allow DSL to compete with it on an equal footing. Indeed, far from taking steps to dismantle the edifice of regulation that applies only to DSL, the Commission is currently contemplating regulations that would *exacerbate* that regulatory disparity. In the *Advanced Services FNPRM*, the Commission has proposed a broad array of new and ever more intrusive unbundling requirements on incumbent LECs' "next generation" DSL equipment.[17] As the Commission has recognized, this equipment is capable of providing DSL service to millions of consumers who would otherwise not be able to receive it.[18] Deployment of that equipment would therefore go a long way toward mitigating cable's broadband market dominance, which is based in large measure on the fact that the cable incumbents are currently able to offer broadband service to far more customers than the telephone companies can.[19]

Nevertheless, the Commission has threatened to take actions that would stifle that "next generation" deployment with a host of new regulations. In the words of one equipment

---

[17] *Advanced Services FNPRM* ¶¶ 56-64.

[18] *See* Second Memorandum Opinion and Order, *Ameritech Corp., and SBC Communications Inc. For Consent to Transfer Control of Corporation's Holding Commission Licenses and Lines*, 15 FCC Rcd 17521, 17523-24, ¶ 4 (2000).

[19] *See* FCC Staff Report, *Broadband Today* at 26 (Oct. 1999); *see also* Sanford C. Bernstein & Co. and McKinsey & Co., *Broadband!* at 30-31 & Exhs. 22, 26 (Jan. 2000) (forecasting that cable would reach 63,680,000 households, and DSL 38,560,000, by year end 2000); *compare* Bear Stearns Equity Res., *Byte Fight!* at 36 (Apr. 2000) (by year-end 2000, all major cable operators would "have at least 70% of their plant at 750 MHz or above," and most would be "largely completed with their upgrades by the middle of 2002") *with Fixed Wireless Competition Order*, 15 FCC Rcd at 11870, ¶ 29 ("Forty percent to fifty percent of local lines in the National Exchange Carrier Association pools exceed three miles, at or beyond DSL's practical limit of 3.4 miles . . . .").

manufacturer — who as a supplier of "inputs" has "the incentive to make a completely unbiased judgment on the matter"[20] — these proposed regulations "create real disincentives to [incumbent LEC] deployment" of next generation facilities.[21] In fact, in one state, SBC has already halted deployment of those facilities because the state commission has adopted regulations analogous to those that the Commission is currently contemplating nationwide.[22]

That result is a disaster for consumers. As the Commission's staff has explained, "regulators should not, without a compelling public policy rationale, skew technological development or choice by putting or keeping in place rules that favor one technology or technological application over another. Yet this is what might happen with broadband network development if lawmakers and regulators are not careful."[23] To date, the Commission has not been careful, and that lack of care is having a significant adverse effect on the broadband market. By stifling the deployment of the DSL facilities that could threaten cable's broadband hegemony, the Commission has already assisted the cable incumbents in assembling a two-to-one lead over

---

[20] *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993).

[21] Catena Comments at 6, CC Docket Nos. 98-147 & 96-98 (FCC filed Feb. 27, 2001); *see also* Carol Wilson, *All Dressed Up with Nowhere to Go*, The Net Economy, Mar. 5, 2001, at 28, 29 (quoting Alcatel's Vice President for Wireline Marketing: because of the Commission's existing and pending regulations, "[t]he Bell companies are totally holding back" in deployment of next generation DSL equipment).

[22] *See SBC to Halt Project Pronto Effort in Illinois, Citing State Decision*, clec.com (Mar. 21, 2001), *at* http://www.clec.com; *see Advanced Services FNPRM* ¶ 56 (proposing that CLECs be allowed to invade incumbent LEC remote terminals and install their own line cards in ILEC next generation digital loop carrier facilities).

[23] Robert M. Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change*, OPP Working Paper No. 24, ¶ 23 (Nov. 1998).

DSL in the market for broadband Internet access.[24] Now the Commission threatens to enmesh DSL in additional regulations, and thereby to entrench that cable dominance.

That result, in turn, would be a disaster not just for consumers, but for the Commission as well. If the Commission places additional shackles on DSL, it could guarantee cable broadband dominance for years to come. And that dominance, of course, would beget even more regulation, as the Commission will be required to take steps to mitigate cable's abuse of its market power. Rather than perpetuating and even extending its control over these vital new markets, the Commission should acknowledge what everyone else seems to — that DSL is simply one broadband distribution platform among many, and it is no more worthy of regulation than any other service provider in a competitive market — and act accordingly.

The Commission must therefore reverse course, and develop a coherent, uniform national broadband policy that applies to all providers — a policy that, in the words of Chairman Powell, is "'not so technology-centric.'"[25] Unless and until it does so, DSL will not be able to seriously challenge cable-based broadband. And without that challenge, the burgeoning ITV services market, like any other market that relies on a high-speed two-way connection, will suffer.

---

[24] *See Seventh Video Competition Report* ¶ 52 ("By June 2000, there were 820,000 DSL subscribers compared to more than 2.3 million cable Internet access subscribers."); Industry Anal. Div., FCC, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, at Table 5 (Oct. 2000) (estimating 950,590 ADSL subscribers and 2,248,981 coaxial cable subscribers as of June 30, 2000).

[25] *Cable Bureau Suggests Regulatory Forbearance for New Services*, Communications Daily, Feb. 23, 2001 (quoting FCC Chairman Michael K. Powell). Such a policy would also demand that the Commission, in the now-pending *Computer III Further Remand* proceeding, reject its outdated and one-sided CEI and ONA regulations, and substitute a coherent and uniform broadband regulatory scheme that eliminates the anti-competitive effects of disparate regulatory treatment. *See* Further Comments of SBC Communications Inc., CC Docket Nos. 95-20 & 98-10 (FCC filed Apr. 16, 2001); Further Comments of BellSouth Corp., CC Docket Nos. 95-20 & 98-10 (FCC filed Apr. 16, 2001).

II. EVEN WITH A VIABLE, DEREGULATED DSL PLATFORM, CABLE HAS SIGNIFICANT ADVANTAGES IN THE ITV SERVICES MARKET.

Even if the Commission does unleash DSL and permit it to compete with cable on an equal footing, there remain substantial questions about the ability of that platform — or any other platform, for that matter — to provide a viable substitute for cable in the distribution of ITV services. As the Commission has already noted, and as SBC and BellSouth confirmed in their opening comments, the cable platform's upstream and downstream service attributes, coupled with cable's enduring power in the MVPD market, provide a distinct advantage in the market for ITV services.

Commenters largely agree. Cable's "technological . . . advantages over rival distributors of broadband services" could "enable it to dominate the emerging ITV market."[26] Likewise, cable may be able to "leverage" its "MVPD market power . . . in a fashion that could have anticompetitive effects on nascent ITV services . . . ."[27] Together, these advantages may provide cable operators with "the capacity . . . to manipulate the fledgling [ITV] market in ways that would protect [their] own commercial interests at the expense of the public's interest in new services."[28] Indeed, even the cable industry's own association can bring itself to argue only that "cable's platform will *not necessarily* be dominant" for ITV.[29]

---

[26] Non-MVPD Owned Programming Networks at 13-14; *see also, e.g.*, NAB at i-ii ("even non-vertically integrated cable operators will be able to exercise inordinate influence over the offering of ITV services, given the absence of other competitively viable platforms for delivering the full range of ITV services").

[27] DIRECTV at 3; *see also, e.g.*, NAB at i-ii (expressing concern that cable can "leverag[e] . . . market power in the analog world into the broadband digital environment").

[28] Gemstar at 1.

[29] NCTA at 20 (emphasis added).

Significantly, it is the providers of "inputs" to ITV services — set-top box providers, as well as non-MVPD programming content providers — that are most vocal in their concerns about cable's prospective market power. Thus, for example, a coalition of equipment retailers, who provide set-top boxes that will be in high demand if and when the ITV market flourishes, stress the "inherent disadvantage" that alternative providers face when competing with cable in this market.[30] The coalition therefore stresses the importance of ensuring that open standards govern the operability of customer premises equipment that incorporates ITV services capability.[31] Similarly, a coalition of independent programming providers, who provide the content that is the backbone of ITV services, express concern regarding cable's control over both "the video stream" and "the two-way connection" that are essential to ITV service distribution.[32] This coalition accordingly advocates "technologically neutral, nondiscrimination safeguards to ensure that vertically integrated broadband distribution providers with market power . . . do not use their control of the broadband platform to degrade or impede access to unaffiliated ITV content and services at the expense of consumer choice."[33]

---

[30] CERC at 4.

[31] *See id.*; *see also* EarthLink at 16 ("If the cable operator is able to use the set-top box ["STB"] to restrict access to caching for [ITV] services, it will provide the cable operator a considerable competitive advantage."); AOL Time Warner at 15-16 (conceding importance of "ensur[ing] that competing ITV providers [are] able to manufacture and market their own ITV-compatible digital STBs . . . thereby bypassing the cable operator's own STB"). *See generally* Further Notice of Proposed Rulemaking and Declaratory Ruling, *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199, 18202, ¶ 9 (2000) (seeking comment on whether existing standards are sufficient to allow "consumer electronics manufacturers to build a navigation device that provides consumers a viable alternative to the equipment provided by their service provider").

[32] Non-MVPD Owned Programming Networks at 17.

[33] *Id.* at 2.

Second only to consumers, these "input" providers have the most to gain from free and unfettered competition in the market for ITV services. Thus, as noted above, they have "the incentive to make a completely unbiased judgment" on whether regulation of cable is likely to help or hinder the ITV services market.[34] Although SBC and BellSouth remain of the view that it is too early in the development of this new market to determine whether cable's existing advantages in broadband distribution will lead to market power in ITV services, these commenters' concerns provide the Commission with ample cause to continue to monitor the market's growth.

III. THIS COMMISSION HAS AUTHORITY TO REGULATE THE CABLE PLATFORM AS A TELECOMMUNICATIONS SERVICE.

If the Commission determines in the course of that monitoring that the cable incumbents possess market power in the distribution of ITV services, it has ample authority to regulate the cable platform — like any other broadband distribution medium used to provide Internet-based services — under Title II of the Act. No commenter provides any basis for disputing that contention.

A. It is undisputed that ITV services are "information services." The 1996 Act defines an "information service" as, among other things, "making available information via telecommunications." 47 U.S.C. § 153(20). That is precisely what ITV services do. *See NOI* ¶¶ 7, 12 (ITV services "ma[ke] available to the subscriber" a variety of "information" via a "two-

[34] *Western Elec. Co.*, 993 F.2d at 1582.

way connection").[35] Accordingly, even the cable operators concede that "the ITV services mentioned in the [*NOI*] . . . qualify as 'information services.'"[36]

As SBC and BellSouth explained in their opening comments, it necessarily follows from that concession that an ITV service provider that *self-provides* the transmission component of its service offering may also be subject to regulation as a Title II telecommunications carrier. As the Commission has made clear repeatedly, it reserves the authority to classify a facilities-based information service provider as a "telecommunications carrier" subject to Title II.[37] And as Commission precedent makes equally clear, it will exercise that authority if the provider possesses market power in the distribution of that service.[38]

---

[35] *See also, e.g.*, *NOI* ¶ 6 (like Internet service providers, ITV service providers often provide the ability "to access a chat room or email service"); *Seventh Video Competition Report* ¶ 41 n.126 (ITV service "can include basic Internet-like functionality, such as real-time text messaging ('chat'), and e-mail"); *AT&T/MediaOne Order*, 15 FCC Rcd at 9864, ¶ 108 (ITV services include "electronic commerce (shopping), electronic banking, video-on-demand, limited or full-service Internet access, and hyperlinking"); Ken Kerschbaumer, *Fulfilling the Promise*, Broadcasting & Cable, July 10, 2000, at 22 (ITV service offers "computer features like e-mail, personal calendars, and chat rooms"); Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11533, ¶ 68 (1998) ("*Report to Congress*") (Internet service is an "information service" under the Act).

[36] AT&T at 36; *see* Comcast at 17 ("The [*NOI*] also asks whether ITV services can properly be classified as information services. . . . Comcast believes that they can.").

[37] *See, e.g.*, *Report to Congress*, 13 FCC Rcd at 11530, ¶¶ 59-60 ("Since *Computer II*, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced. But the matter is more complicated when it comes to offerings by facilities-based providers."); *id.* at 11534, ¶ 69 (in cases where an ISP owns transmission facilities, "[o]ne could argue that [the ISP] is furnishing raw transmission capacity to itself"); Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) ("We note that BOCs offering information services to end users . . . are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.").

[38] *See, e.g.*, Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589, ¶ 9 (1998) (Commission precedent requires "regulatory treatment as a common carrier" only where carrier "has sufficient market power" over the market for the underlying transport service); Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, OPP

These principles firmly establish that the Commission has authority to regulate cable's provision of ITV services, if indeed the Commission determines that cable possesses market power. Accordingly, if DSL remains too severely shackled by Commission regulation to mount a serious threat to cable, or if cable's inherent advantages prove too substantial for competing platforms to overcome, then Commission precedent dictates that the cable platform be regulated as a telecommunications service under Title II, subject to the equal access and nondiscrimination requirements that such treatment requires. Simply put, if cable has distribution market power, "[t]he two-way connection" that it relies upon to provide ITV services "is a 'telecommunications service'" under the Act.[39]

Regulation of the cable platform as a common carrier "telecommunications service" would, in addition to being fully consistent with Commission precedent, avoid the First Amendment concerns expressed by the cable operators.[40] In the words of Justice O'Connor — who *dissented* from the Supreme Court's decision to uphold the 1992 Cable Act's must-carry regime[41] — "if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies."[42]

Working Paper No. 32, at 9 (Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power"); *see also* SBC/BellSouth at 5-8; SBC/BellSouth Open Access NOI Comments at 15; SBC/BellSouth Open Access NOI Reply Comments at 13.

[39] EarthLink at 14; *cf. AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) ("To the extent [the cable Internet service provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [it] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.").

[40] *See* AT&T at 38-39; Cablevision at 19; NCTA at 49-53.

[41] *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 229-30 (1997) (O'Connor, J., dissenting).

[42] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part).

B. Recognizing that the Act's "information service"/"telecommunications service" dichotomy requires Commission intervention if cable has market power, the cable operators attempt to escape that dichotomy by characterizing ITV services (or at least some of them) as "cable services" subject to Title VI of the Act.[43]

That attempt fails. To qualify as a "cable service" under the 1984 Cable Act, ITV services would have to involve, among other things, the transmission of "video programming" or "other programming service." 47 U.S.C. § 522(6); *see* SBC/BellSouth at 10. As to "video programming," however, the Commission itself recognized that ITV services are "supplementary" to video programming. *See NOI* ¶ 7. Those services therefore cannot be thought of as part of that same programming.

The cable operators nevertheless make much of the existence of applications that allow consumers to choose the precise version of "video programming" they wish to view.[44] But these specific applications are no more "interactive" than conventional channel selection, and are therefore not fairly characterized as "ITV services." The services that are truly interactive, and that are therefore the proper subject of this proceeding, allow consumers not just to choose TV content, but also "to drill deeper into [that] content for statistics, information on cast members, or even the means to buy products related to the programming."[45] Thus, as EarthLink explains, truly interactive television permits activities that involve "data processing, . . . electronic mail, shopping, banking, or other services in which the user engages in . . . manipulation of information."[46] And as SBC and BellSouth have already explained, these are precisely the sort

[43] *See, e.g.*, NCTA at 41; AT&T at 35-36; Comcast at 14.

[44] AOL Time Warner at 5-7; AT&T at 8-10; Cablevision at 15-16.

[45] Ken Kerschbaumer, *Fulfilling the Promise*, Broadcasting & Cable, July 10, 2000, at 22.

[46] EarthLink at 13.

of services that Congress specifically said were *excluded* from the definition of cable service. The legislative history accompanying the 1984 Cable Act specifically notes that Congress intended to exclude from the "cable service" definition services such as "shop-at-home and bank-at-home," as well as "electronic mail," and "one-way and two-way transmission o[f] non-video data"[47] — *i.e.*, exactly the sort of services that the Commission has previously identified as ITV services.[48]

Moreover, this understanding of the term "cable service" — which excludes ITV services that build upon the video programming stream to offer consumers unique, interactive experiences — is independently confirmed by the fact that, as a statutory matter, a "cable service" must involve "one-way transmission to *subscribers*." 47 U.S.C. § 522(6)(A). A "subscriber" is "a member of the general public who receives broadcast programming distributed *by a cable system*." 47 C.F.R. § 76.5(ee) (emphasis added). No one disputes that ITV services can be (and often are) provided over *non*-cable systems, including DSL and satellite. Classification of ITV service as a "cable service" when it happens to be provided over the cable platform would therefore embrace exactly the sort of "regulatory distinction based purely on technology" that the Commission has repeatedly rejected.[49]

Nor can ITV services be considered "other programming service[s]." As SBC and BellSouth explained in their opening comments — and as other commenters confirm[50] — the

---

[47] H.R. Rep. No. 98-934, at 44 (1984).

[48] *See, e.g., Seventh Video Competition Report* ¶ 206; *see also NOI* ¶ 6 (ITV services include the ability "to access a chat room or email service to be used in conjunction with a video stream"); *AT&T MediaOne Order*, 15 FCC Rcd at 9864, ¶ 108 (ITV services include, *inter alia*, "electronic commerce" and "electronic banking").

[49] *See, e.g., Report to Congress*, 13 FCC Rcd at 11548, ¶ 98. *See generally* SBC/BellSouth at 10 & n.20.

[50] SBC/BellSouth at 11; *see, e.g.*, EarthLink at 2-5.

statute defines "other programming services" as "information that a cable operator makes available *to all subscribers generally*." 47 U.S.C. § 522(14) (emphasis added). As the Commission has already acknowledged, ITV services typically involve personalized applications — the ability "to access a chat room," for example, or to engage in "electronic banking" — that are the antithesis of information that is "available to all subscribers generally."[51]

Contrary to certain cable operators' claims, moreover, it is immaterial that, under the 1996 Act, the term "cable service" now includes "subscriber interaction" required not only for the "selection" of video programming or other programming service, but also for their "use."[52] As the statute plainly states, and as no party contests, regardless of the amount or type of "subscriber interaction" contemplated by the statute, a service cannot qualify as a "cable service" unless it includes "video programming" or "other programming service." As the above analysis demonstrates, and as the Commission has made clear in its previous characterizations,[53] ITV service includes neither.

The cable operators' contention that ITV services are "cable services" is inconsistent not just with the statute and its legislative history, but also with decades of Commission precedent. As noted above, the cable operators concede that ITV services are, first and foremost, "information services." They therefore acknowledge — as they must — that such services are *not* "cable services" when provided over DSL or satellite. Rather, ITV services qualify as "cable services," the argument goes, only when they happen to be "provided by a cable operator."[54]

---

[51] *See Seventh Video Competition Report* ¶ 206; *AT&T MediaOne Order*, 15 FCC Rcd at 9864, ¶ 108; *see also NOI* ¶ 6.

[52] *See* AT&T at 35-36; Comcast at 14.

[53] *See supra* pages 15-16 n.48.

[54] NCTA at 41.

That contention, however, runs headlong into the decades-old principle that services are regulated based on their nature, not on who happens to provide them.[55] Indeed, under the cable operators' logic, basic telephone service would also be transformed into a "cable service" when it is "provided by a cable operator." That logic fails. The Commission has long held that a service that is regulated in a particular fashion when provided by one transmission medium is regulated in precisely the same fashion when provided by a cable operator.[56] Accordingly, ITV services, which virtually all parties concede are "information services" when provided over DSL or satellite, remain "information services" when provided by a cable operator. And that result, even aside from the obvious benefit of lending coherence to the statutory scheme, offers the additional advantage of supporting a uniform broadband regulatory scheme, independent of legacy or technology.

CONCLUSION

Although the Commission has purported to adopt a "hands off" policy toward broadband, the fact is that it has kept its hands firmly on the DSL platform. If the Commission is truly committed to allowing the market to respond to cable's indisputable advantages in ITV services, it must take its hands off DSL too and allow that platform to compete with cable on an equal

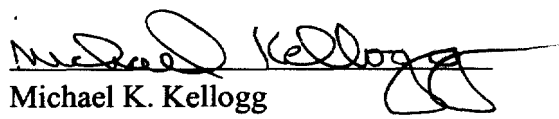
---

[55] *Report to Congress*, 13 FCC Rcd at 11548, ¶ 98 (the Communications Act does not purport to make "regulatory distinctions based purely on technology"); *see also* Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 386, ¶ 2 (1999) (the 1996 Act is "technologically neutral"); Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper No. 30, at 87 (Aug. 1998) (noting the "fundamental communications policy goal[]" of "competitive and technological neutrality").

[56] *See, e.g.*, Initial Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 468, 483, ¶ 4 (1961) (applying Title II regulation to cable, in case involving *self-provision* of carriage by a cable operator to "itself or an entity closely affiliated with itself"), *aff'd*, Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 460, ¶ 2 (1962), *aff'd*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 366 (D.C. Cir. 1963).

footing. Any other approach will necessarily lead to entrenched and enduring cable market power, which, as the above discussion makes clear, will necessitate still more regulation. The Commission should thus act without delay to establish a coherent, national, uniform broadband regulatory policy that properly takes into account each of the facilities-based platforms existing in the market.

Respectfully submitted,



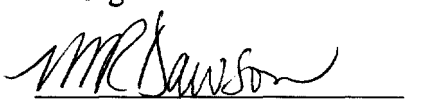
Michael K. Kellogg
Colin S. Stretch
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for SBC Communications Inc. and BellSouth Corporation

Jeffry A. Brueggeman
Roger K. Toppins
Paul K. Mancini
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8895
Counsel for SBC Communications Inc.

Charles P. Featherstun
Theodore R. Kingsley
David M. Falgoust
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E., Suite 1700
Atlanta, GA 30309
(404) 249-3855
Counsel for BellSouth Corporation

CERTIFICATE OF SERVICE

I, Michelle R Dawson, hereby certify that on the 11th day of May 2001, a copy of the *Reply Comments of SBC Communications Inc. and BellSouth Corporation* was served via hand delivery* and/or by U.S. First Class Mail to the following:



Michelle R. Dawson

Royce Dickens*
Cable Services Bureau
Federal Communications Commission
445 12th Street SW
Room 3A729
Washington, DC 20554

International Transcription Service*
1231 20th Street, NW
Washington, DC 20036

George Vradenburg, III
Steven N. Teplitz
AOL Time Warner Inc.
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Peter D. Ross
Andrew K. Long
Marcus E. Maher
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Counsel for AOL Time Warner Inc.

Mark C. Rosenblum
Stephen C. Garavito
Martha L. Marcus
AT&T Corp.
295 N. Maple Avenue
Room 1131M1
Basking Ridge, NJ 07290

Douglas Garrett
AT&T Broadband
188 Iverness Drive West
Englewood, CO 80112

Willkie, Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Suite 600
Washington, DC 20036

Counsel for AT&T Corp.

David L. Donovan
1320 19th Street, NW
Suite 300
Washington, DC 20036

Counsel for Association of Local Television Stations, Inc.

Victor Tawil
Association for Maximum
Service Television, Inc.
1776 Massachusetts Ave., NW
Washington, DC 20036

Jonathan D. Blake
Amy L. Levine
Covington & Burling
1201 Pennsylvania Ave., NW
Washington, DC 20004

Counsel for the Association for Maximum Service Television, Inc.

Charles Forma
Lee Schroeder
Elizabeth Losinski
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris
Glovsky & Popeo, P.C.
701 Pennsylvania Ave., NW
Suite 900
Washington, DC 20004

Counsel for Cablevision Systems Corporation

Tara K. Giunta
Matthew Vitale
Coudert Brothers
1627 I Street, NW
Washington, DC 20006

Jean-Marc Racine
Patrice Birot
Canal+ US Technologies
20230 Stevens Creek Blvd.
Cupertino, CA 95014

Counsel for Canal+ Technologies

Paul Glist
Wesley R. Heppler
T. Scott Thompson
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006

Counsel for Charter Communications, Inc.

Thomas R. Nathan
Joseph W. Waz, Jr.
Comcast Corporation
1500 Market Street
Philadelphia, PA 19102

James R. Coltharp
Comcast Corporation
2001 Pennsylvania, NW
Suite 500
Washington, DC 20006

James L. Casserly
Fernando R. Laguarda
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., NW
Suite 900
Washington, DC 20004

Counsel for Comcast Corporation

Joe D. Edge
Mark F. Dever
Jennifer L. Blum
Drinker, Biddle & Reath
1500 K Street, NW
Washington, DC 20005

Robert S. Schwartz
Catherine M. Krupka
McDermott, Will & Emery
600 13th Street, NW
Washington, DC 20005

Counsel for Consumer Electronics Retailers Coalition

Harold Feld
Andrew J. Schwartzman
Cheryl A. Leanza
Media Access Project
950 18th Street, NW
Suite 220
Washington, DC 20006

Counsel for Consumers Union, Consumer Federation of America & The Center for Media Education

Gary M. Epstein
James H. Barker
Latham & Watkins
1001 Pennsylvania Ave., NW
Suite 1300
Washington, DC 20004

Counsel for DIRECTV, Inc.

Dave Baker
EarthLink, Inc.
1430 West Peachtree Street
Suite 400
Atlanta, GA 30309

Earl W. Comstock
John W. Butler
Sher & Blackwell
1850 M Street, NW
Suite 900
Washington, DC 20036

Counsel for EarthLink

David K. Moskowitz
EchoStar Satellite Corporation
5701 South Santa Fe
Littleton, CO 80120

Pantelis Michalopoulos
Omer C. Eyal
Steptoe & Johnson, LLP
1330 Connecticut Ave., NW
Washington, DC 20036

Counsel for EchoStar Satellite Corporation

Stephen A. Weiswasser
Mary Newcomer Williams
Covington & Burling
1201 Pennsylvania Ave., NW
Washington, DC 20004

Counsel for Germstar-TV Guide International, Inc.

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

Counsel for National Association of Broadcasters

Daniel L. Brenner
Neal M. Goldberg
Diane Burstein
Michael Schooler
1724 Massachusetts Ave., NW
Washington, DC 20036

Counsel for the National Cable Television Association

Jeffrey P. Cunard
Debevoise & Plimpton
555 13th Street, NW
Suite 1100E
Washington, DC 20004

Counsel for the National Football League

Lawrence R. Sidman
Lawrence Duncan, III
Neil Fried
Verner, Lipfert, Bernhard,
McPherson, & Hand, Chtd.
901 15th Street, NW
Suite 700
Washington, DC 20005

Counsel for the Non-MVPD Owned Programming Networks

James W. Harper
PolicyCounsel.Com, Inc.
P.O. Box 77576
Washington, DC 20013

Counsel for OpenTV, Inc.

Jeffrey A. Eisenach, Ph.D.
Randolph J. May
The Progress & Freedom Foundation
1301 K Street, NW
Suite 550 East
Washington, DC 20005

The Progress & Freedom Foundation

Gregory Ferenbach
Jill D. Morganbesser
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314

Marilyn Mohrman-Gillis
Lonna M. Thompson
Andrew D. Cotlar
The Association of America's
Public Television Stations
1350 Connecticut Ave., NW
Washington, DC 20036

Counsel for Public Broadcasting Service & The Association of America's Public Television Stations

Robert J. Gerrard, Jr.
Scripps Networks, Inc.
1180 Avenue of Americas
Suite 1710
New York, NY 10036

Counsel for Scripps Networks, Inc.

Burt A. Braverman
Maria T. Browne
Christin S. McMeley
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., NW
Second Floor
Washington, DC 20006

Counsel for TGC, Inc. d/b/a The Golf Channel, Speedvision Network L.L.C., Outdoor Life Network, L.L.C., & The Weather Channel, Inc.

Matthew P. Zinn
2160 Gold Street
Alviso, CA 95002

Counsel for TiVo, Inc.